

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

BRAGG'S ELECTRIC CONSTRUCTION CO.,

Employer,

Case 27-RC-8425

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 68,

Petitioner.

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On January 12, 2006¹, the Petitioner, International Brotherhood of Electrical Workers, Local 68, filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent journeymen and apprentice electricians licensed in Colorado who have been hired by Bragg's Electric Construction Co. On January 26, 2006 a hearing was held before Hearing Officer Krista L. Zimmerman. The undersigned issued a Decision and Order on February 23 dismissing this petition because the record evidence established that the electrical work being performed by the employees who were the subject of the petition was nearing completion and those employees did not have an expectation of continued employment in Colorado beyond a few months. I found on that basis that it would serve no useful purpose to direct an election in this matter. However, that Decision and Order also provided that should the Employer's work that it was performing on either of the two projects in Colorado continue for a substantially longer period of time than was reflected by the record evidence or should

¹ All dates are 2006 unless otherwise noted.

the Employer acquire additional construction projects in the state of Colorado utilizing employees contemplated by the petition, the undersigned would entertain a motion by the Petitioner to reinstate the petition.

On March 22 the Petitioner in this case filed a Motion to Reinstate Petition asserting that the Employer had acquired additional construction projects in the State of Colorado utilizing employees contemplated by this Petition and that one of the existing construction projects being performed in Colorado had been extended for a substantially longer period of time, through January 2007. On March 28 the Employer filed a Response in Opposition to Motion to Reinstate Petition in which it disputed specific factual representations made in the Petitioner's Motion. Since the Petitioner's Motion to Reinstate Petition raised factual issues which could most appropriately be resolved based upon sworn testimony taken at a formal hearing, a supplemental hearing was held on April 5, before Hearing Officer Krista L. Zimmerman. Following the close of the hearing, the parties timely filed briefs.²

The first issue is whether the evidence garnered at the supplemental hearing establishing that the Littleton project will not be completed until November 8 warrants reversal of my initial decision to dismiss the Petition. For the reasons enunciated below, I find that the completion of work at the Littleton project is not sufficiently imminent to warrant dismissal of the Petition and I shall direct an immediate election.

See *Davey McKee Corp.*, 308 NLRB 839 (1992) and the cases cited below.³

² I find that the hearing officer's rulings made at the supplemental hearing are free from prejudicial error and are hereby affirmed.

³ The Petitioner asserted in its Motion to Reinstate Petition that the Employer also had a new project to update the lighting fixtures at the Park Meadow Dillard's store. The record established that job involved a team of two permanent electrical employees who were traveling to various existing stores throughout the western United States to install upgraded light fixtures. The Park Meadow upgrade began on March 20 and was to be completed by April 14. The Employer did transfer one permanent employee to work on

The second issue is the composition of the appropriate unit. The Petitioner seeks only to represent approximately 9 employees hired locally by the Employer to work at the two Dillard's construction sites.⁴ While the Petitioner and Employer agree that any unit found appropriate should include electrical employees at both the Aurora and Littleton projects, the Employer contends that the only appropriate bargaining unit must also include the approximately 18 permanent employees who have been transferred to the Aurora and Littleton job sites because they work side-by-side with the locally hired employees, share common supervision, perform the same duties and responsibilities, and enjoy similar wages and benefits.⁵ There is no history of collective bargaining for any of the employees at issue in this case.

I conclude that the petitioned-for unit is not appropriate because it is based on an arbitrary grouping of employees, rather than on departmental or craft lines which the Board utilizes for construction industry employers, and I shall direct an election in the broader unit proposed by the Employer. See, **Bartlett Collins Co.**, 334 NLRB 484 (2001) and the cases cited below.

Based on my findings and the factual and jurisdictional findings contained in my February 23 Decision and Order, I find that a question affecting commerce exists

that upgrade for two days because the team assigned to the job was delayed on another project in Texas. Based on the limited duration of that project, I do not base my decision to direct an election in this case on that project.

⁴ The unit described in the Petition is:

Included: All Colorado State licensed electricians and Registered Colorado apprentices employed by Bragg's Electric Construction Co., working in the State of Colorado.

Excluded: All clerical, confidential and office staff, and supervisors as defined by the Act.

⁵ The numbers of locally-hired and permanent employees specified in this Decision are based on an employee list reflecting current employees working at the Employer's Aurora and Littleton jobsites that was admitted into evidence at the supplemental hearing. Therefore, although the numbers of locally-hired and permanent employees set forth in this Decision differ from the numbers set forth in the February 23 Decision and Order I have based the facts set forth in this Decision on that updated and more current employee list.

concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. I further find that it is appropriate to direct an election in the following unit of employees:

INCLUDED: All licensed electricians and registered apprentices employed by the Employer in the State of Colorado.

EXCLUDED: All office clericals,⁶ confidential employees, guards, and supervisors as defined by the Act.⁷

STATEMENT OF THE CASE

A. Facts

The background evidence regarding the Employer's operations and the advent of the Aurora and Littleton, Colorado construction projects is set forth in the February 23 Decision and Order attached as Exhibit A and made a part of this Decision. The supplemental record establishes that at the time of the supplemental hearing approximately 9 locally-hired employees and 14 permanent employees were performing the Employer's electrical work at the Aurora project. That project is at its

⁶ The Petitioner contends that Shirley Quinn, Al Dawson, and Christy Gilbert are office clericals, and accordingly should be excluded from the unit. The Employer contends that they are electrical apprentices, or alternatively, plant clericals, and therefore are eligible to vote. The Petitioner and Employer elected not to litigate this issue, and instead stipulated that they should be allowed to vote subject to challenge. Accordingly, I direct that Shirley Quinn, Al Dawson, and Christy Gilbert be allowed to vote subject to challenge and make no findings regarding their unit placement.

⁷ In the February 23 Decision and Order, I found that Aurora superintendent Kevin Gosney and Littleton superintendent Mike Quinn were statutory supervisors on the basis that the parties stipulated, as supported by record evidence, that they possess and exercise statutory supervisor indicia. The parties renewed that stipulation at the supplemental hearing and on that basis I shall exclude Kevin Gosney and Mike Quinn from the unit. Additionally, in the first hearing, the Petitioner contended that three foremen, Mike Gilbert, Lynn Hoerchler at Aurora, and Dewey Beard at Littleton were statutory supervisors. The parties elected not to litigate the supervisory status of those individuals at the first hearing, but stipulated that they should be allowed to vote subject to challenge. At the supplemental hearing, the Employer changed its position regarding the foremen, and the parties stipulated that the three current foremen, Mike Gilbert and Adam Ayers at Aurora, and Dewey Beard at Littleton, should be excluded from the unit on the basis that they possess supervisory authority and are statutory supervisors. On the basis of that stipulation and the record as a whole, I shall exclude Mike Gilbert, Adam Ayers, and Dewey Beard from the unit as statutory supervisors.

peak now, and will begin to wind down by the end of April. The record now establishes that the Employer anticipates that by the middle of July there will be about four employees on the Aurora project working on punch list items. Construction is scheduled to be completed as of July 21, but the Employer will keep several employees on the job working on punch-list items through the store grand opening on August 9. As the Aurora project winds down, the Employer intends to begin transferring electrical employees to the Littleton project.

While the Employer currently has only about four permanent employees working on the Littleton project, that will change as the electrical workers are transferred from the Aurora project in the near future.⁸ The Littleton project will be at its peak in June at which time the Employer anticipates utilizing approximately 1320 straight time man-hours, and 400 overtime hours per week. The Littleton project is then scheduled to begin to wind down through the now scheduled construction completion date of October 20. The Employer now anticipates that it will still be utilizing about 160 man-hours per week through the month of October, and will keep several employees on that job to do punch list work until the Littleton store grand opening on November 8, 2006.

The ultimate reduction in the work force at the Littleton project will involve transferring permanent employees to other of the Employer's out-of-state projects and permanently laying off the locally hired employees. The selection of local hires for layoff from the Aurora project versus transfer to the Littleton project and then layoff from the

⁸ The electrical work on the Littleton project suffered a delay caused by a concrete problem requiring caissons to be replaced. According to the record, that problem will not result in delaying the store's grand opening, but will likely result in the Employer's employees working significant overtime to make up the lost production time.

Littleton project will be based upon the requirements of Colorado law⁹ specifying the allowable ratio of journeymen to apprentices. In this regard, while many of the Employer's permanent employees are actually long-term journeymen, under Colorado law the Employer was required to reclassify them as apprentices. Consequently, the majority of the locally hired employees were already registered in Colorado as journeymen and were hired to satisfy state of Colorado requirements. As a result, the Employer may actually retain locally hired employees longer on these Colorado job sites than it might retain them under similar circumstances at construction sites located outside of Colorado.

C. Community of Interest

The parties did not present additional community of interest evidence in the supplemental hearing, but relied on the record developed in the initial hearing. While the record does not provide great detail regarding community of interest factors, both Vice President Levick and Petitioner witness employee Troy Kirkbaum testified at the initial hearing that the locally hired and permanent employees have daily work contact because they work side-by-side, performing electrical construction work. The uncontroverted testimony also establishes that both locally hired and permanent employees work under the supervision of the two respective job superintendents on the Aurora and Littleton projects. There is also evidence of interchange between the electrical workers at the two job sites as needed, based on the demands of the two projects.

⁹ CRSA Sec. 12-23-100

With regard to wages and benefits, the record establishes that the locally hired employees are paid between \$20.00 and \$23.00 per hour while the permanent employees earn lower hourly wage rates, between \$18.50 and \$21.50 per hour. Both permanent and locally hired employees are eligible for health insurance after they work for the Employer for 60 days. The permanent employees are paid for drive time and gasoline purchases when they travel from one out-of-state project to another and they also receive between \$700 to \$900 subsistence pay per month while working on out-of-state projects. Neither the permanent nor locally hired employees receive travel compensation for drive time or mileage while commuting to work on the Aurora or Littleton projects, or when traveling between the two projects.

CONCLUSIONS AND FINDINGS

A. Imminent cessation issue

I turn first to the issue of whether the Petition should be dismissed because cessation of electrical work at the Aurora and Littleton projects is imminent, as urged by the Employer. There have been numerous Board decisions establishing that where an employer's operations are scheduled for imminent completion, no useful purpose would be served by directing an election. See *Davey McKee Corp.*, 308 NLRB 839 (1992), and the cases cited therein. For instance, in *M. B. Kahn*, 210 NLRB 1050 (1974), the Board refused to direct an election where about five months of work remained at the time the regional director issued a decision. In *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974), the Board dismissed a petition which was filed approximately four and one-half months before the plant was scheduled to be closed. Also, in *Plum Creek Lumber Co.*, 214 NLRB 619 (1974), the Board determined that it would not effectuate

the policies of the Act to hold an election in a unit scheduled to undergo “imminent substantial contraction” within four months. See also, *Hughes Aircraft Co.*, 308 NLRB 82 (1992); *Larsen Plywood Co.*, 223 NLRB 1161 (1976); *Armour & Co.*, 62 NLRB 1194 (1945).

The Aurora store construction is now at its peak, with a scheduled grand opening on August 9. The completion of that project falls squarely within the *Davey McKee* line of cases which provide that it will not effectuate the purposes of the Act to hold an election where the Employer’s relevant operations are scheduled for imminent completion within three to four months of the hearing date. The Littleton project however, does not fall within the time period established in those cases. The evidence presented at the initial hearing, which formed the basis for my February 23 Decision and Order, was based on Employer witness testimony which was inaccurate. In the supplemental hearing, Employer Vice President Levick corrected his earlier testimonial estimates that construction on the Littleton project would be completed in early September resulting in a grand opening a month later. Documentary evidence now establishes that the Littleton project will not be substantially completed until the end of October with the grand opening of that store scheduled for November 8. Moreover, the Employer’s written projections for straight and overtime hours establish that the Littleton job will not peak until at least June, and will involve over 8500 man-hours of electrical work between the beginning of July and completion of the project. Accordingly, I conclude that it is appropriate to direct an election for the Aurora and Littleton unit employees because cessation of work on the Littleton project is not imminent as contemplated by *Davey McKee* and the cases cited therein, and because

the Employer anticipates transferring employees directly from the Aurora project to the Littleton project as the former winds down and the latter ramps up.

B. Unit Determination

The Petitioner seeks to represent only the locally hired employees on the basis that “the local residents share a clear and overriding community of interests distinct from the travelers, and should be permitted to vote in that unit.”¹⁰ The Petitioner does not cite any authority in support of its contention, but argues that locally hired electrical workers have a divergent community of interest from the travelers because the travelers are reimbursed for their interstate travel expenses; receive subsistence for housing expenses; and are paid within a lower hourly wage range than the locally hired employees. The Employer contends that the only appropriate unit must include its permanent employees because these employees work side-by-side with local employees and thus have frequent contact while performing identical work, share identical supervision, enjoy the same benefits, and have similar wage rates.

As the Petitioner correctly asserts, the Board has long held that a unit need not be the only appropriate or even most appropriate unit, but merely an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109 (1989). It is well settled that bargaining units in the construction industry may be appropriate on the basis of either a craft or departmental unit if the unit is a clearly identifiable and homogeneous group of employees with a community of interest separate and apart from other employees. See e.g., *S.J. Graves & Sons*, 267 NLRB 175 (1987), *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978), *R. B. Butler Inc.*, 160 NLRB 1595 (1966); *Del Mont Construction Co.*, 150 NLRB 85 (1964). However, if

¹⁰ Petitioner’s initial post-hearing brief, page 8, and brief following the supplemental hearing, page 12.

there is no craft or homogeneous grouping of employees with a community of interest sufficiently distinct from other employees to constitute a separate unit, an overall unit may be the only appropriate unit. *A.C. Pavement Co.*, 296 NLRB 206 (1989); *The Longcrier Company*, 277 NLRB 570 (1985).

As the Board recently reiterated in *Barron Heating & Air Conditioning, Inc.*, 343 NLRB No. 58 (2004):

In determining an appropriate bargaining unit, the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. It is well settled that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be an appropriate unit. [Citations omitted.] Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. *Bartlett Collins Co.*, 334 NLRB 484 (2001).

With regard to determining whether the petitioned-for unit is appropriate the Board determines whether the employees in the petitioned-for unit "share a sufficient community of interest in view of their duties, functions, supervision, and other terms and conditions of employment, to constitute an appropriate unit." *Johnson Controls, Inc.*, 322 NLRB 669, 670 (1996). See, also, *Barron Heating*, *supra*, citing *Johnson Controls*; and *P.J. Dick Contracting Inc.*, 290 NLRB 150 (1988). Finally, as noted by the Employer, the appropriateness of a unit may not be based solely on a union's extent of organizing.

Turning to specific community of interest factors, I find that the similarity in duties, work functions, supervision, and other terms and conditions of employment of the permanent and locally hired employees requires a finding that the locally hired employees do not constitute a clearly identifiable and homogeneous group of

employees with a community of interest separate and apart from the Employer's permanent employees. While the Petitioner asserts that the locally hired employees constitute a separate appropriate unit because the permanent employees receive special compensation for traveling out-of-state to the Employer's projects, it does not cite any authority in support of this proposition. I find that the receipt of travel compensation and subsistence pay are insufficient to overcome the other community of interest factors present in this case. In reaching this conclusion, I note that the Board clearly contemplates construction industry units which include permanent employees and temporary employees. See e.g. *Steiny and Company, Inc.*, 308 NLRB 1323 (1992), in which the Board devised a special construction industry voting formula to prevent disenfranchising laid off "temporary" employees because the hiring patterns in the industry include the precise hiring pattern used by the Employer herein, namely an employer which supplements its core employees by project only hires.

Since I have rejected the unit proposed by the Petitioner as inappropriate, and the Petitioner has expressed its willingness to proceed to an election in any unit found appropriate, I turn next to determining the appropriate unit. In this regard, in *Overnite*, supra, the Board stated:

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. [Citations omitted.]

I find that the unit proposed by the Employer is an appropriate unit because the permanent employees and locally hired employees share a community of interest in essential terms and conditions of employment, and I shall direct an election in that unit.

In this regard, the Board in *MJM Studios of New York, Inc.*, 336 NLRB 1255 (2001), determined that it was appropriate to include 13 “temporary” construction employees in a unit with the employer’s “regular” employees because there was “no dispute that they work side-by-side with the regular employees, performing the same work, under the same supervision. . . . The fact that they receive different wages and benefits than the “regular” employees does not require their exclusion from the unit. [Citations omitted.] Id at 1257. See also, *Ameritech Communications, Inc.*, 297 NLRB 654 (1990).

Accordingly, I shall direct an election in a unit including both the locally hired and permanent journeymen and apprentice electricians working on the Employer’s Aurora and Littleton, Colorado projects.

There are approximately 24 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board’s Rules and Regulations.¹¹ Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.¹² Employees engaged in any economic strike, who

¹¹ Your attention is directed to Section 103.20 of the Board’s Rules and Regulations. Section 103.20 provides that the Employer must post the Board’s Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

¹² Because the Employer herein is clearly an employer in the construction industry, and in the absence of a stipulation to not use the Daniel formula, the Daniel formula shall be utilized in this matter. Based on my determination that the Daniel/Steiny eligibility formula is applicable, those eligible to vote shall also include those employees in the unit found appropriate who have been employed 30 days or more within

have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

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the 12 months immediately preceding the eligibility date for the election, or who have had some employment within that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily. *Daniel Construction Company*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992).

¹³ Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by May 3, 2006. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **April 26, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Dated at Denver, Colorado, this 19th day of April, 2006

B. Allan Benson, Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433

